STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2006
v	No. 263444 Genesee Circuit Court
PAUL BLAKE DIAZ, Defendant-Appellant.	LC No. 05-015805-FC

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury for criminal sexual conduct, first-degree, MCL 750.520b(1)(a), and criminal sexual conduct, second-degree, MCL 750.520c(1)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 15 to 40 years and 10 to 15 years, respectively. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

The complainant was a nine-year-old girl spending the weekend at the home of her paternal grandmother. Defendant was also staying at the home while performing repair work on the residence. Around 2:00 a.m. on March 7, 2004, defendant arrived at the house and had to be let in by the girl's aunt. The girl was sleeping on a couch in the living room. Both defendant and the aunt went upstairs to their rooms to sleep.

What happened next is disputed. According to the girl, she awoke to find defendant rubbing her between her legs under her panties, putting a finger where she urinates, and touching her chest through a shirt in which she had been sleeping. She claimed that she removed defendant's hand from her chest, told him to stop, and ran into her grandmother's bedroom. According to the grandmother, when the aunt admitted defendant into the house around 2:00 a.m., her granddaughter jumped up in her sleep, yelled, and then went to sleep in the grandmother's room. The girl did not make any allegations of sexual abuse against defendant that night. According to the aunt, she did not hear defendant return to the downstairs at any time later that night.

The girl's mother picked her daughter up from the grandmother's house on Sunday. However, the girl did not tell her mother about the alleged incident until Monday after school

because she thought that her mother would be angry. The mother called the police, went to the police station with her daughter, and then they both went to the hospital. Later the mother called the grandmother about the girl's allegations. The grandmother claimed that she was shocked when the mother told her that defendant had sexually assaulted the girl. The girl was examined by a physician who found a linear abrasion, about three-quarters of an inch long, outside the girl's vagina and next to her urethra. The physician said that the abrasion was consistent with manipulation of the genitalia by bare skin or by a callus on a finger, but was more consistent with a fingernail or sharp instrument.

The jury was instructed on the crimes of first-degree and second-degree criminal sexual conduct as follows:

> He [defendant] has pled not guilty to those charges, so in order to prove first in Count I, Criminal Sexual Conduct in the first Degree, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendant, Paul Blake Diaz, engaged in a sexual act that involved the insertion of his finger into the victim's vaginal area. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated; and that at the time complainant . . . was less than 13 years of age.
>
> In Count II, Criminal Sexual Conduct in the Second Degree, the People must prove the following elements beyond a reasonable doubt:
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> First, that the defendant, Paul Blake Diaz, intentionally touched [the complainant's] breast or the clothing covering that area of her body.
>
> Second, that the touching was done for sexual purposes or could reasonably be construed as having been done for sexual purposes.
>
> And, third, that the complainant . . . was less than 13 years of age at the time of the alleged touching.
>
> To prove these charges, Members of the Jury, it is not necessary that there be any evidence, other than the testimony of [the complainant], if her testimony proves guilt beyond a reasonable doubt. To prove this charge, the prosecutor does not have to show that [the complainant] resisted the defendant.

Defendant argues on appeal that the jury instructions denied him a fair trial because they allowed the jury to convict him on less or different evidence required by the statutes. We disagree.

II. STANDARD OF REVIEW

Defendant did not challenge the instructions at trial. Accordingly, these issues are not preserved, and this Court will review these issues only for plain error resulting in prejudice. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Jury instructions must clearly

present the case and the applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005); *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *McKinney, supra* at 162-163. An appellate court reviews jury instructions in their entirety to determine if there was error requiring reversal. Even if the instructions are imperfect, there is no error requiring reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

III. ANALYSIS

A person may be convicted of first-degree criminal sexual conduct if the evidence shows that he has engaged in "sexual penetration" with another person who is under 13 years of age. MCL 750.520b(1)(a). "Sexual penetration" is statutorily defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(o).

When read as a whole, we conclude that the circuit court's instruction fairly presented the issue to be tried and protected defendant from being convicted on less or different evidence than statutorily required. The phrasing, "insertion of his finger into the victim's vaginal area," is equivalent to the expression, "other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." Although "vaginal area" differs from "genital . . . opening," the difference is immaterial because, anatomically, digital insertion into the vaginal area involves "intrusion . . . into [a] genital . . . opening." The phrase "vaginal area" does not permit a juror to find defendant guilty of first-degree criminal sexual conduct based merely on the touching of a surface area because access to the vagina or "vaginal area" requires "penetration," "intrusion," or "insertion" beyond the labia majora into a genital opening. Thus, the circuit court's instruction, which specifically used the phrasing, "insertion of [defendant's] finger into the vaginal area," reasonably informed the jury of the required intrusion into a genital opening.

To convict a defendant of second-degree criminal sexual conduct, the evidence must show that the defendant engaged in "sexual contact" with another person who was under 13 years of age. MCL 750.520c(1)(a). "Sexual contact" is statutorily defined as including "the intentional touching" of the complainant's "intimate parts" or "the clothing covering the immediate area of the [complainant's] intimate parts" if the intentional touching was "done for a sexual purpose, or in a sexual manner." MCL 750.520a(n).

Again, when we read the jury instructions as a whole, we conclude that the circuit court's instruction fairly presented the issue to be tried and adequately protected defendant from conviction on less than the statutorily required evidence. The phrasing, "intentionally touched [the complainant's] breast or the clothing covering that area of her body" is equivalent to the expression, "intentional touching of the clothing covering the immediate area of [the complainant's] intimate parts." Accordingly, we affirm both of defendant's convictions.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette